IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-1084

CHARLES F., MICHAEL L. and L.M. ANDERSON
t/a ANDERSON SEAFOOD COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners, Charles F., Michael L. and L.M. Anderson, petition for a writ of certiorari to review the judgments of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, reversing the District Court, (App. A, pp. 1a-11a) is reported at 450 F.2d 567 (1971). The findings of fact and conclusions of law of the District Court (App. C, pp. 13a-24a) are not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1971. (App. B, p. 12a) On January 11, 1972, Mr. Justice Powell extended the time for filing a petition for writ of certiorari to and including February 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. The Federal Insurance Contributions Act (FICA)[1] and the Federal Unemployment Tax Act (FUTA)[2] impose excise taxes on employers measured by the compensation paid to "employees." Where an employer-employee relationship exists the employer is liable for the taxes; if the relationship does not exist no tax is imposed. 26 U.S.C. § 3121(d) and 3306(i) define both what an "employee" is and what he is not. The term excludes as "employees" all persons except—"any individual, who under the usual common law rules applicable in determining employer-employee relationships, has the status of an employee." In this case the District Court, sitting without a jury, found that captains and crewmen using the petitioners' commercial fishing vessels were not the petitioners' employees within the meaning of the Acts. The question presented is whether, in setting aside this determination, the Court of

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[1] 26 U.S.C.A. §§ 3100 et seq.

[2] 26 U.S.C.A. §§ 3300 et seq.

Appeals overstepped the proper bounds of appellate review and applied erroneous legal principles.

2. Employer-employee relationships which determine maritime employers' excise tax obligations under the FICA and FUTA are judged against standards of the general maritime law. In the case on review, the Court of Appeals argues that the boatowners' excise tax obligation to the government is determined by testing the "employee" status of the captains and crewmen against the provisions of the Jones Act (46 U.S.C. § 688), a maritime negligence statute, rather than the provisions of the FICA and FUTA which prescribe the legal test of excise tax liability for employers generally. The question presented is whether a determination of the boatowners' tax liability by reference to a negligence statute, rather than the tax statutes Congress provided for that purpose, violates the "uniformity" provisions of Article I, Section 8 of the Constitution.

CONSTITUTION, STATUTES and REGULATIONS

United States Constitution, Article I, Section 8, Cl. 1:

> "The Congress shall have power to lay and collect taxes, duties and imposts and excises * * * but all duties, imposts and excises shall be uniform throughout the United States."

Pertinent portions of §§ 3121 and 3306 of the Internal Revenue Code of 1954, and §§ 31.3121(d)-1 and 31.3306(i)-1 of the Treasury Regulations on Employment Tax are printed at App. D, p. 25a. A pertinent portion of the Merchant Marine Act of 1920, c. 250, 41 Stat. 988, Sec. 33; 46 U.S.C. § 688 (the Jones Act) is printed at App. D, p. 29a.

STATEMENT

The jurisdiction of the District Court was invoked because a question arises under the application of the Internal Revenue laws of the United States. The petitioners commenced this suit against the United States in the District Court seeking a refund of FICA and FUTA taxes erroneously paid and unlawfully collected.

The petitioners, (herein called "owners") are individuals engaged in the seafood business. This included the purchase of snapper, an edible fish; from boat captains to whom the petitioners let their commercial fishing boats, together with the subsequent sale of the fish to others on the open market. (App. C, p. 14a-15a.) The vessels involved were owned by the petitioners and operated out of docking facilities leased by them at Panama City, Florida. (App. C, p. 14a.)

The petitioners contracted with experienced fishermen to whom their boats were let for engaging in commercial snapper fishing. (App. C, p. 15a.) In consideration for letting the boats to the captains in was understood that they would sell the entire catch to the owners at an agreed price, after bi-lateral negotiations, for delivery at Panama City, Florida. (App. C, pp. 15a, 16a, 20a.) The captains and crewmen were paid nothing by the owners unless snapper were caught and delivered, irrespective of the time or effort exerted or the amount of money expended by them in the venture. (App. C, pp. 15a, 17a, 19a.)

The fishing operations were conducted by the captains without interference by the owners. Each trip was considered a separate and complete undertaking and was treated by the parties as such. (App. C, pp. 15a, 16a, 18a.) The owners relinquished all control over the manning of the vessel to the captain, who hired and organized the entire crew. It was solely the captains' prerogative to determine the crew size (usually eight or nine members), their qualifications, their duties and working conditions,

the amount of money they would be paid, and all other matters incident to manning and operating the vessel. (App. C, pp. 15a, 16a-17a.)

The owners relinquished to the captains control, command and navigation of the vessels including—when to depart on a trip, where to fish, when to return, how to fish (the actual mechanical processes for use of the gear) and all other matters relative to the operation and maintenance of the vessel from the time of departure until the fish were returned, unloaded and sold. (App. C, p. 15a.) Without reservation, the owners relinquished all right to direct and control the manner and method of conducting the fishing and accomplishing the results desired. The owners' primary interest was to obtain and market the largest catch of snapper possible. (App. C, pp. 16a, 20a). There was no express agreement specifying the extent to which control may be exercised by the owners over the fishermen nor was there any actual control exercised by the owners over the details and methods employed by them. (App. C, p. 16a).

It was understood between the owners and captains that each could terminate their relations after completion of a trip and prior to commencing another one for any reason, but not while a trip was in progress. Termination by an owner may result where a captain's action could cause destruction of the vessel, endanger life or dispose of a catch to others in breach of the parties' agreement, or where profitable catches were not being made. (App. C, p. 15a) Custom and practice dictated that separate trips were made over an extended time and rarely for a single trip. (App. C, p. 15a) Some captains, by choice, came and went after a few trips; others continued a series of trips over a period of several years. (App. C, pp. 15a-16a.)

It was part of the captain's function to unload the fish for sale and to keep the vessel clean and ship-shape while in port. The fishermen received no additional pay for these functions apart from the sale price of the fish to

the owners. If the crew failed to perform the unloading or cleaning and others were hired for the work, such individuals were paid out of the absent fishermen's earnings. The owners had no responsibility for defraying the costs of these functions. (App. C, p. 16a)

The actual fishing activities and compensation arrangements between the captains and crewmen were negotiated between them to the complete exclusion of the owners. Each fisherman (exclusive of the captain) separately caught, boxed and tallied his separate catch of fish, and his compensation was measured by the weight of his particular catch. No other payment was made to him irrespective of his individual success or failure. A captain's earnings were based on an agreed percentage of the collective catches made by the crewmen. (App. C, pp. 16a-17a, 18a-19a) Three crew members received an extra amount for special services above the earnings from their own catch. This additional amount ranged from ½ cent to 1 cent per pound of the entire catch. The function of the "icer" was to place the individual catches of the other crewmen in the ice compartments of the ship's hold. The cook performed all the required galley services and the engineer was recognized for his unique ability. All of these arrangements were undertaken without interference from the owners. (App. C, p. 17a)

All trip expenses were the obligation of the fishermen and were paid by them without reimbursement by the owners for each trip. They paid for all food, groceries and tobacco consumed, all ice necessary for the trip and all diesel oil and fuel used in the operation. In addition, they furnished and paid for all fishing tackle necessary for making fish catches, together with all the bait required. They paid for all cooking bottled gas, as well as cooking utensils, bedding, laundry, knives, gloves, foul weather gear and the like, and even the chart paper used in the depth recorders. They were charged for the cost of a food freezer aboard the vessel used to preserve their food during a trip and made rental payments for the use of radar

equipment. All of the foregoing were paid for in cash or charged against the proceeds of the sale of the fish when purchased on the vessels' or owners' credit. (App. C, pp. 17a, 18a-19a) Since the captains were liable for the cost of ice and fuel, it was solely within their discretion to determine the quantity of each to take aboard. (App. C, p. 18a)

After each trip the owners and captains worked out a settlement of the monies involved in the purchase and sale of the fish together with the amounts to be charged against the sale price for trip expenses and any advances made to the captains against the catch. (App. C, p. 18a) The captain kept a daily tally sheet recording the weight of each crewman's catch. At the conclusion of a trip the captain's tally sheet was used as the basis for the sale negotiations between him and the owners. (App. C, pp. 18a-19a)

Ordinarily a trip would last from one to two weeks for successful fishing, but it was the captain's decision, to the exclusion of the owners, to fish a shorter time. If a captain decided to continue fishing without returning to Panama City to unload the catch, he would put into a convenient port and unload the fish catch onto refrigerated trucks for transport to the owners at Panama City, Florida. (App. C, p. 19a.) It was the captain's choice and discretion that determined how long they and the crews remained ashore between trips before commencing another one. (App. C, p. 19a.)

If a trip was unsuccessful and the value of the catch was insufficient to cover the trip expenses incurred, such expenses, if charged to the credit of the owners, were carried over to a succeeding trip and charged against the sale proceeds of a subsequent catch. Any unpaid expenses charged to the vessel were the personal debts and obligations of the captain. (App. C, p.19a)

Although the vessels were equipped with radios which permitted contact with the owners only through a marine operator, there was literally no communication between the captains and the owners while the vessels were at sea.

Communication with an owner, if any, usually originated with the captain respecting emergency repairs or to arrange for unloading facilities in anticipation of the vessel's return to the docks. (App. C, pp. 19a-20a.) All repairs to the vessel, and insurance, if any, were paid by the owners. (App. C., pp. 14a, 17a-18a.)

The owners had no control over the crewmen, nor attempted to exercise any control over their activities through the captains, nor did the owners intend to reserve such exercise of control over them. (App. C, pp. 16a, 20a.) Clearly, the owners relinquished command, management and navigation of the vessels to the captains, save as to the results of the venture, embracing the right to purchase the entire catch for delivery at Panama City, Florida. (App. C, pp. 16a, 20a.)

The District Court, having in mind agency principles under general maritime law, concluded there was nearly a total relinquishment of control of the vessels to the captains implying the creation of demise charter arrangements in a commercial context. (App. C, pp. 21a-22a, 23a, 24a.) The Court of Appeals reversed, contending that the relationships did not create demise charter arrangements measured according to the liberal and humanitarian criteria of the Jones Act and maritime tort decisional rules, and the captains and crewmen were, therefore, the owners' employees. From a judgment for the owners the government appealed.

REASONS FOR GRANTING THE WRIT

1. The court of appeals' decision misconstrues the guidelines for determining employer-employee relationships under the FICA and FUTA involving fishermen in the only two cases decided by this Court, i.e., *United States v. Webb*, 397 U.S. 179 (1970) and *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1964). The court's ruling also, we submit, conflicts with the purposes of the FICA and FUTA. The ruling in the case under review is important not only to the Andersons and their captains but to all commercial

fishing boatowners and their charterers, and beyond that, to all commercial vessel owners of every kind whose charter arrangements will affect their FICA and FUTA tax liabilities which have grown rapidly over the past few years.

United States v. Webb, and *Enochs v. Williams Packing Co., supra*, held that both Acts "specifically adopt the common law test for ascertaining the employer-employee relationship." (370 U.S. 1, 3) Lending support to the requirement for the application of agency principles, *Webb, supra*, observed that when defining who were employees, there was no rule of thumb "displacing the complex of common law rules Congress so carefully tried to preserve." (*Webb*, 397 U.S. 194) *Webb* added that in the maritime field the viability of the common law rules dictated that the status of fishermen was to be judged "against the standards of maritime law", (*Id.*, 397 U.S. at 194), and that they would be considered employees "except where there is nearly a total relinquishment of control through a bareboat or demise charter" arrangement. (*Id.*, 397 U.S. 192)

The court of appeals agreed that the district court's findings were supported by the evidence (App. A, p. 2a, 4a, ftn. 4), and that maritime standards were applied in reaching the conclusion that the fishermen were not the petitioners' employees. (App. A, p. 5a, ftn. 5). The point of divergence, leading to reversal, was the district court's refusal to consider cases involving personal injuries under the Jones Act and maintenance and cure which were adopted by the court of appeals as the applicable maritime law when determining "employee" status under the FICA and FUTA. (App. A, pp. 8a-9a, ftn. 11, 12)

The significance of the court of appeals' decision, unless corrected, will result in deficiencies in employment taxes retrospectively assessed by the Revenue Service affecting the lives, businesses and aspirations of numerous fishing boatowners who, until now, followed the Fifth Circuit's guide-lines for fixing employment tax liabilities set out in *United States v. Crawford Packing Co.*, 330 F.2d 196

(C.A.-5, 1964). It held that shrimp fishermen were not the vessel owners' employees under principles of common law agency. The court of appeals' enlarged standards of the Jones Act for determining employer-employee relationships, were considered inapposite and unnecessary to a tax case decision in *Crawford Packing Co., supra.*

The district court's application of common law agency principles is supported by the legislative history of the FICA and the FUTA and the interpreting Treasury Regulations[3] which represent Congressional disapproval of the so-called "economic reality" test as a primary tool to determine the presence or absence of an employer-employee relationship for tax purposes.[4]

The district court applied agency rules under the general maritime law giving primacy to "control, (which) is probably the most important factor under maritime law * * *" for determining "employee" status (*Webb*, 397 U.S. at 192), implying the existence of a demise charter within a commercial context. (App. C, p. 21a) Once this relationship is found to exist, the petitioners cannot be the employers of the fishermen and be required to meet the tax obligations under the FICA and FUTA.

Keeping in mind that Congress discarded the "economic reality" test of "employee" for FICA and FUTA purposes, Congress did intend, however, that the purposes of the Jones Act should not be constricted by the common-law concepts of control so as to bar from its benefits, as independent contractors, those, who were as a matter *economic reality*, dependent upon the business to which they rendered services. *Cosmopolitan Shipping Co. v.*

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[3]See text in App. D, pp. 26a-28a.

[4]This Court provided a concise account of the development of the concept of "economic reality" and its legislative rejection in *United States v. Webb*, 397 U.S. at 182-188. See also, S. Rep. No. 1255, 80th Cong. 2nd Sess., (1948), reprinted at 2 U.S. Code Congressional Service and Administrative News (1948) pp. 1752-1775.

McAllister, 337 U.S. 783, 790 (1949). Clearly, the agency standards favoring a demise in a commercial context here were far afield from the humanitarian policies in the Jones Act cases, cited by the court of appeals, disfavoring a demise in a personal injury context in order to preserve seamens' traditional rights to recover against vessel owners for fatal and non-fatal injuries. (App. A, pp. 8a, 9a) This comparison tends to strengthen the proposition that within a commercial context, as opposed to a personal injury context, the district court properly implied the existence of a demise under the facts here. (App. C, pp. 21a, 23a, 24a)

The court of appeals was under the erroneous impression that this Court, in *Webb*, barred it from applying the common-law rules simply because it was a maritime case.[5] The court below erred in concluding that it was required to apply the free-wheeling definition of "employee" found in Jones Act decisional rules as the measure of the petitioners' tax obligations, without regard to agency principles under the general maritime law.

Implicit in both *Webb* and *Williams Packing Co., supra*, a demise may exist in a commercial context according to the principles of general maritime law, which in a personal injury context, by maritime standards deviating from the general maritime law, may result in an employer-employee relationship. There is no anomaly in such a result. The dual role of "employee" status in our complex economic society is not uncommon in land-based affairs.[6] No logical reason appears for its nonexistence in the maritime field. This Court should clarify the separate legal tests distinguishing demise charter status under the FICA and FUTA from a demise under the Jones Act.

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[5] "In reversing our first *Webb* decision the Supreme Court made it unmistakably clear that we committed error in applying common-law principles * * *." (App. A, p. 7a)

[6] *NLRB v. Hearst Publications*, 322 U.S. 111, 122 (1943) held that one may be an independent contractor under the common law control test and also be an employee for purposes of workman's compensation.

Whether a demise would exist by the application of the enlarged standard for determining employer-employee relationships under the Jones Act is unnecessary to a decision in a tax case. This is so because when deciding issues of FICA and FUTA tax obligations, only the vessel owners and the United States are parties. Under the Jones Act, the United States is not a party nor are taxes in issue. Instead the parties are injured seamen and vessel owners. Jones Act issues concern compensation for personal injuries, not taxes. Thus Courts have deviated from the general maritime law in personal injury cases requiring, for humanitarian reasons, that seamen, the wards of the admiralty court, not be precluded *ipso facto* from recovery simply by the construction of an implied demise. It was error for the court below to attempt to fashion all maritime standards to fit the Procrustean bed of the Jones Act. Although common factors—employee status—may emerge under the tax Acts and the Jones Act, nevertheless, independent consideration and resolution is possible. Disregard for the common law agency rules, emphasizing control, required by this Court in both *Webb* and *Williams Packing Co., supra,* and making decisive instead the irrelevant criteria of the Jones Act—the apparent logic of the court of appeals—is to curtail the application of the FICA and FUTA radically. The propriety of the approach by the Fifth Circuit[7] is a question warranting review by this Court.

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[7]This is not the first time that the Fifth Circuit followed such an approach. Following reversal of *United States v. Webb*, 402 F.2d 956 (C.A.-5, 1968) by this Court at 397 U.S. 179 (1970), the Circuit Court, on remand, followed a *dictum* previously written in the 1968 case to the effect that the only maritime standards it recognized in FICA and FUTA tax cases were the decisional rules under the Jones Act and for maintenance and cure. 402 F.2d at 959. The *dictum* was repeated in the case under review. (App. A, p. 6a and ftn. 8)

2. The Court committed serious error by overstepping the proper bounds of appellate review. The undisputed facts show that the owners actually relinquished command, navigation and control over their vessels to the captains in consideration for the entire catch of fish at negotiated prices. All fishing was done by the captains without scrutiny, direction or control by the owners except as to the results, i.e., the sale and delivery of the catch to the owners at Panama City, Florida. The fishermen were paid solely on the basis of their individual catches. As a result some would prosper and others would lose on the same trip. There were no guaranteed earnings of any kind from the owners. The fishermen bore a substantial risk of loss by virtue of their obligation to defray all the costs of the trip. Whether there was a profit or loss depended upon how the captain, as any other businessman, combined efficiency and economy in operating his vessel.

Independence among fishermen is traditional. The factors of control here are virtually nonexistent. To regard these captains as common law employees strains reality. Application of the statutory concept of employment in the context of a particular industry involves an exercise of judgment that, we stress, is peculiarly within the province of the finder-of-fact rather than in a reviewing court. In making the determination required by the statute, a multitude of factors—all of the incidents of the relationship—must be assessed and weighed, and there is no hard-and-fast rule to guide decisions. A determination by a trial judge in the capacity of jury and judge should be accorded the highest deference by a reviewing court. This was not a purely factual finding by the trial judge, but involved the application of law to the facts—what do the facts establish under the common law of agency applied to the sea: employee or independent contractor? Such a determination should not be set aside just because the court of appeals would, as an original matter, decide the case the other way. Here the district court made a choice between

two fairly conflicting views. The "clearly erroneous" rule of civil actions is applicable to suits in admiralty in general,[8] and to the existence of operative facts of a demise charter in particular. *Guzman v. Pichirilo*, 369 U.S. 698, 702 (1962). The court of appeals should have upheld the trial court. The error should be corrected by this Court in the interest of sound administration of the tax provisions under the FICA and FUTA.

3. The Fifth Circuit's imposition of the dimensionless and amorphous concept of employer-employee relationships, peculiar to the Jones Act (46 U.S.C. § 688) as the measure of petitioners' excise tax liability, violates the "uniformity" requirements of Article I, Section 8, Cl. 1 of the United States Constitution.

Petitioners, and boatowners similarly situated throughout the country, become obligated to the United States for these taxes only in the absence of demise charters between the owners and the boat captains. The sole question, therefore, is whether the captains are "employees", or, in maritime parlance, "demisees" (independent contractors), within the meaning of the federal tax statutes (FICA and FUTA). This question cannot be determined by whether or not they may be "employees" within the meaning of a maritime negligence statute—the Jones Act—as required by the court of appeals.[9] Article I, Section 8, Cl. 1 of the United States Constitution, *supra*, p. 3, requires that liability for excise taxes shall be *uniform*

[8] *McAllister v. United States*, 348 U.S. 19, 20 (1954)

[9] Citing *Stevens v. Seacoast Co.*, 414 F.2d 1032 (CA-5, 1969) the Fifth Circuit said: "We * * * held the demise charter test to be the proper standard for defining the relationship between vessel owners and seamen under admiralty law—the Jones Act." (App. A, p. 9a)

throughout the United States. The employment taxes here involved are excise taxes. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583 (1937) and *Helvering* v. *Davis*, 301 U.S. 619, 645 (1937). Under the Fifth Circuit's decision, the Andersons and all boatowners in the Fifth Circuit must measure their excise tax obligations by a negligence statute (Jones Act) while other employers, everywhere, measure their obligations by the tax Acts Congress legislated for that purpose. Gauging identical tax burdens by different legal standards is clearly discriminatory. According to settled doctrine, "[t]he rule of (excise tax) liability shall be the same in all parts of the United States." *Steward Machine Co. v. Davis*, 301 U.S. at 583. Although the Equal Protection clause is not a limitation upon the powers of the national government, nevertheless a gross discrimination would probably violate due process.[10]

Unless corrected by this Court, the Fifth Circuit's error may tend to adversely affect the fishing industry in other coastal areas and impair the efficient administration of employers' tax obligations generally in the maritime field. If there is to be a digression from the uniform imposition of excise taxes by the FICA and FUTA, it should be allowed only after full review by this Court.

4. Inherent in the Fifth Circuit's opinion is the implication that vessel owners rather than captains would be a more responsible source upon whom the liability for collecting these taxes should fall. Assuming, *arguendo*, this to be true, to hold these seamen were employees *on these facts* in order to provide the tax collector with a more responsible collection source will require a change in established maritime doctrine under this Court's *Webb* decision[11]—a change the courts should leave to the Con-

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[10] "[D]iscrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." *Steward Machine Co. v. Davis*, 301 U.S. at 585.

[11] This Court said the standards to be applied for determining "employee" status are those found in the FICA, FUTA and Treasury Regulations. *Webb*, 397 U.S. at 182-188, 196. Neither the Jones Act nor maritime tort rationale were mentioned in *Webb*.

gress. As a basis for reversal, the Fifth Circuit was much persuaded by the concept that petitioners' payment of the taxes involved constituted evidence that the seamen were employees.[12] Common sense dictates that a court must first reach a conclusion that the boatowner is an employer before considering whether or not employment taxes are owed, not the other way around. The court's opinion below, if allowed to stand, will pose a dilemma for all taxpayers litigating employment tax refund suits. If the mere payment of a tax is an admission that it is legally due, then the adversary process in tax refund litigation will become frustrated and meaningless. Had petitioners failed to make such withholdings and payments they would have been subjected to assessments and penalties[13] and to possible criminal sanctions. See, 26 U.S.C. § 7202. Nor could petitioners have enjoined the enforcement of the tax, *Enochs v. Williams Packing Co.*, 370 U.S. 1, nor challenged the deficiency in the Tax Court.[14] To suggest, as the Fifth Circuit implies, that petitioners should not have paid the taxes if they believed the fishermen were not employees would be to approve snares and traps for the unwary. In addition, the payment of the taxes was a jurisdictional prerequisite to the filing of this suit. It would be a strange law, indeed, which first required the payment of the tax as a basis for

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[12] "[T]he trial court made no mention of the fact that income tax payments were withheld from payments made to the captains and individual crew members." (App. A, p. 4a, ftn. 4) Also, at App. A, p. 3a: "Income taxes were withheld by the taxpayers from such payments."

[13] *Williams Packing Co. v. Enochs*, 176 F. Supp. 168, 170, (SD Miss., 1959) aff'd. 291 F.2d 412 (CA-5), rev'd on jurisdictional grounds 370 U.S. 1. Failure to withhold taxes resulted in large deficiencies and seizure of the vessels.

[14] The Tax Court has no jurisdiction in respect of FICA and FUTA taxes. Jurisdiction is confined to income, estate and gift taxes. 26 U.S.C. § 7442.

the filing of the suit for tax refund, and then permit its payment to be a ground for defense against the claim. Unless this Court corrects the ruling below, the mere payment of a tax in the Fifth Circuit, and perhaps beyond, will frustrate a claim for its refund.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1972

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1332

CHARLES F., MICHAEL L. and L. M. ANDERSON
t/a ANDERSON SEAFOOD COMPANY, ET AL.,
Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

(October 27, 1971)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

GEWIN, Circuit Judge: This is a tax refund case. Under federal law[1] an employer is responsible for the

[1]Federal Insurance Contributions Act, 26 U.S.C.A. § 3101 et seq.; Federal Unemployment Tax Act, 26 U.S.C.A. § 3301 et seq. In both of the cited statutes "employee" is defined to include "any individual who, under the usual common law rules applicable in determining the employer-employee relationship has the status of an employee."

payment of a specified portion of social security and unemployment taxes on the earnings of his employees. In this case the district court granted taxpayers,[2] owners of commercial snapper fishing boats, a refund of such taxes which had been paid on behalf of the captains and crews who manned taxpayers' boats. While it is our opinion that the essential and critical findings of fact by the district court are supported by substantial evidence, we reverse because we do not believe that the legal conclusions reached are supported by the facts found.

Taxpayers owned boats used in commercial fishing in the Gulf of Mexico. Oral contractual arrangements in accordance with long established customs of the industry were made with captains who were selected from applicants in the community. Each captain was furnished with an equipped vessel by the owner. The captains were to staff the boats with crewmen and to fish for snapper to be sold to the boat owners at an agreed price. In many cases the captains served on the same vessel for a substantial length of time, although the oral agreements permitted either the taxpayers or the captains to terminate the relationship at the end of any fishing trip. In addition, the taxpayers reserved the right to terminate relations with captains if their actions endangered personnel or destroyed property, if the catch was sold to others without the consent of the taxpayers, or if they failed to make a profitable catch of fish. The captains usually determined the duration of fishing trips which varied according to prevailing

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[2]The taxpayers-appellees are: Charles F., Michael L. and J. M. Anderson t/a Anderson Seafood Company, et al.

circumstances, but agreed to return the catches to the home port and docking facilities leased at the expense of taxpayers without a guarantee of any earnings if they failed to catch fish. Unless the taxpayers gave their consent the catches were delivered only to them at a negotiated price per pound agreed upon prior to the commencement of the trip. The captains managed the details of the operation of the boats and the manner of fishing.

While the captains were free to establish their own standard of compensation, it was the general practice to fix the wage rates by agreement between the captain and the crew based upon the weight of their catch. The earnings of the captains depended entirely upon the total volume of the catches. At the conclusion of a fishing trip the captains delivered a tally sheet to the taxpayers who then performed certain bookkeeping services and computations and issued individual checks to the captains and the members of the crews. Income taxes were withheld by the taxpayers from such payments.

It was clearly understood that the boats were to be operated exclusively for the purpose of snapper fishing. In some circumstances, depending upon market conditions, the taxpayers would receive from the captains and the crews other types of fish at an agreed price. The amounts of fish, other than snapper, which the taxpayers were willing to receive were limited, and any excess was accepted with the understanding that it would be sold on consignment and whatever

price was obtained would be divided between the taxpayers and the fishermen on a negotiated basis.

Boat repairs and maintenance costs were paid for by taxpayers,[3] who were also responsible for property damage to the vessel and for personal injuries to crewmen that resulted from defects in the vessels. Insurance premiums, if any, were paid by taxpayers. Expenses immediately incidental to each fishing trip such as the cost of food, ice, fuel, tackle and bait were borne by the captains and their crews. Supplies were usually purchased at places where the taxpayers maintained credit. At times money was advanced to the captains by the taxpayers against anticipated earnings. The boats were equipped with radios which were used to communicate with taxpayers in case of emergency, or when repairs were needed, and to give approximately 24 hours notice before returning to the home port at Panama City, Florida, designated by the taxpayers as the usual place of unloading the catch. The taxpayers reserved the right to control the results of the fishing venture and they interfered in the process to the degree necessary to assure a proper result.[4]

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[3]In finding of fact number 5 the district Judge stated, "All repairs were made by and paid for by the plaintiffs." In finding number 20 he stated, "Boat repairs and maintenance costs, which were substantial, were the expense of plaintiffs."

[4]The facts herein outlined are without material dispute and are based upon the facts found by the trial court. The trial court made no mention of the fact that income tax payments were withheld from payments made to the captains and individual crew members. The government also calls attention to its Exhibit 8 which reflects that in a personal injury case under the Jones Act, two of the taxpayer partners conceded the employee status of an injured crew member in litigation which arose in the Northern District of Florida in 1967.

With the foregoing facts in mind we must determine whether taxpayers are entitled to the refund allowed by the district court. The answer to that question turns upon whether the taxpayers were employers of the captains and the crew members. The government contends that the employer-employee relationship does exist. On the other hand, the taxpayers urgently contend that the district court correctly decided that the captains and crewmen who operated the fishing boats were not employees of the taxpayers within the purview of the above mentioned acts.

Taxpayers argue for the application of a sort of brackish form of land-based common law principles.[5] We must reject this contention. This case cannot be decided according to land-based common law or upon theories that are a mixture of common law and mari-

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[5] In its brief the taxpayers characterize the ruling of the district court as follows:

> The District Court determined that an insufficient degree of control was exercised by the taxpayer-boat-owners over the captains and crewmen to create an employer-employee relationship under the common law rules in the context of a fishing operation.

At other points in the brief it is stated:

> The factors comprising the "usual common law rules" defining "employees" became integrated with existing general maritime law.
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> ...
>
> It was obvious from the findings that the District Court had the common law test clearly in mind.

While we do not agree with the district court's application of the standards of maritime law, it is obvious to us that the court felt bound by maritime law rather than common law standards. Nevertheless, in its application of maritime law the court excluded consideration of cases involving the Jones Act and cases involving maintenance and cure.

time law. We must move entirely away from the shore to the wide, open sea. Justice Harlan aptly stated the rule when he concluded tersely that maritime law is "the common law of seafaring men."[6]

The issue with which we deal here is not new to this court. When *Webb v. United States*[7] made its first appearance in this court, under facts not greatly dissimilar from those involved in the instant case, we applied common-law rules because we considered that the tax statutes, there discussed and here involved, compelled a decision on the basis of common-law standards. At that time we emphasized the fact that if the court were free to apply maritime law as a test of the employer-employee relationship, the district court's decision could not stand.[8]

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[6]In United States v. Webb, 397 U.S. 179 at 191, 25 L.Ed.2d 207 at 215 (1970) Justice Harlan stated:

> Maritime law, the common law of seafaring men, provides an established network of rules and distinctions that are practically suited to the necessities of the sea, just as land-based decisional law provides a body of rules adapted to the various forms of domestic employment. The goal of minimizing uncertainty can be accomplished, in the maritime field, by resort to the "usual" rules of maritime jurisprudence. (footnote omitted).

[7]402 F.2d 956 (5th Cir. 1968).

[8]In our first *Webb* decision we stated:

> The " 'ancient solicitude of courts of admiralty [sic] for those who labor at sea' continues unchanged despite the progress from canvas sails to diesel engines." In nontax context when courts are asked to determine whether seamen are employees of the vessel's owner, all ambiguities or doubts are resolved in favor of the seaman. Today, the law is clear that in both categories of cases — Jones Act, and maintenance and cure — the owner of the vessel is the employer unless the

In reversing our first *Webb* decision the Supreme Court made is unmistakably clear that we committed error in applying common-law principles and in declining to determine the status of the captains and crewmen against standards of maritime law. The Court squarely rejected the argument that the legislative history and the applicable tax statutes indicated a congressional intent to apply land-based standards to maritime activities. The Court could not accept the thought that Congress intended "the anomalous result" of judging maritime activities by standards which are not relevant to seafaring enterprises. Proceeding a step further, the Court strongly indicated that under maritime law control is the most important factor. Succinctly stated, the Court concluded that:

> [E]xcept where there is nearby total relinquishment of control through a bareboat or demise, charter, the owner may nevertheless be considered, under maritime law, to have sufficient control to be charged with the duties of an employer.[9]

Upon remand we followed the foregoing analysis of the Supreme Court's decision in *Webb*. We recogniz-

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vessel is held under a demise charter. The arrangements here certainly did not constitute demise charters. If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court. This is so because it is clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees.

[9] 397 U.S. at 192, 27 L.Ed.2d at 216.

ed the crucial legal issue to be whether under maritime law the captains and crewmen were employees of the shipowner within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act. Applying maritime law we decided that the relationship was that of employer-employee. We ordered the complaints of the taxpayers dismissed and concluded:

> The Supreme Court held that this Court "erred in declining to judge the status of the captains and crewmen against the standards of maritime law." This holding, coupled with our earlier conclusion that under maritime law the captain is the agent of the owner and the crew hands are employees, leaves no room for further argument as to the appropriate disposition of this case.[10]

Moreover, prior to the Supreme Court decision in *Webb* this court had occasion to consider the validity of a seaman's claim in an action to recover from the owner of a fishing vessel for personal injuries sustained during oyster dredging operations.[11] In *Stevens v. Seacoast Company* we considered the seaman's claim against the shipowner's contention that the master of the fishing vessel was the bareboat charterer or "a sort of seagoing independent contractor

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[10] 424 F.2d 1070 at 1071.

[11] Stevens v. Seacoast Co., 414 F.2d 1032 (5th Cir. 1969). The first Webb decision was decided November 6, 1968, the Supreme Court decision March 3, 1970, *Stevens* was decided on August 13, 1969, and our decision on remand in *Webb* was on June 4, 1970.

carrying on a joint venture with fellow crew members." The shipowner argued that this arrangement made the seaman an employee of the master and not the owner of the ship. We rejected this contention and found that the seaman was an employee of the ship owner. We discussed the matter of control and held the demise charter test to be the proper standard for defining the relationship between vessel owners and seamen under admiralty law — the Jones Act. We expressly emphasized the congressional policy to assure day-by-day protection to seamen.[12]

The case *sub judice* is not one "where there is nearly total relinquishment of control through a bareboat or demise charter." Under the facts disclosed by the record we are compelled to reach the conclusion that the agreements here involved between the boat owners and the captains resulted in an employer-employee

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[12]We concluded:

> [T]he fact that there is no tenure or substantial duration in point of time to the arrangement between Shipowner and Master so that at the first moment the "independent" contractor displeases the shipowner the agreement can be revoked at will, it demonstrates that no real possessory rights are invested in the so-called charterer. But this is the essential requisite of a demise charter to distinguish it from time and voyage charters and the like.
>
> At 1036
>
> . . .
>
> The Jones Act itself is in sweeping terms. Incorporating as it does the Federal Employers' Liability Act, the Jones Act protects seafaring workers against all manner of contracts and agreements which undertake to lessen or avoid the strict responsibilities imposed by Congress upon the employers of seamen.
>
> At 1038
>
> (footnotes omitted)

relationship between the taxpayers on the one hand and the captains and the crewmen on the other. The arrangements between the shipowners and the captains did not constitute a bareboat or demise charter. We do not find it necessary to define in precise, technical terms the meaning of bareboat or demise charter in all circumstances and under other conceivable facts. It is sufficient to say that such charters are characterized by a relinquishment of possession, command and navigation and almost total relinquishment of control.[13]

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[13]Both the courts and the commentators have defined "demise charter" similarly. The following citations are representative: Guzman v. Pichirillo, 369 U.S. 698, 699 (1962) ("To create a demise the owner must completely and exclusively relinquish 'possession, command and navigation' thereof to the demisee."). Reed v. S. S. Yaka, 374 U.S. 410, 412 (1963) ("full possession and control are delivered up to the charterer for a period of time); Reed v. U.S., 11 Wall 591, 601, 20 L.Ed. 220 (1870) ("Unless the ship itself is let to hire, and the owner parts with the possession, command and navigation of the same, the charterer or freighter is not to be regarded as the owner. . . ."); Stevens v. Seacoast Co., 414 F.2d 1032, 1035-37 (5th Cir. 1969); Bergan v. Int'l Freighting Corp., 254 F.2d 231, 232 (2d Cir. 1958) ("Under a demise or bareboat charter, the shipowner parts with all possession of the ship and gives the charterer an interest in it akin to that of a lessee of real property. . . ."); Vitozi v. Balboa Shipping Co., 163 F.2d 286, 287 (1st Cir. 1947) (demise charter "in that by its terms the owner gave to the charterer 'possession, command and navigation of the ship' for a stipulated period of time"); Romana v. West India Fruit and Steamship Co., 151 F.2d 727, 279 (5th Cir. 1946) ("The rule is clear that there is a demise where the charterer is given the possession and control of the vessel"); The Norland, 101 F.2d 967, 971 (9th Cir. 1939) ("The test of whether a charter is a complete demise of a vessel so as to make the charterer owner pro hac vice is whether the entire command and possession of the vessel and consequent control over its navigation has been surrendered"); E. Benedict, The Law of American Admiralty § 96 at 130 n.37 (Supp. 1971); G. Gilmore and C. Black, The Law of Admiralty, 215-19 (1957).

In view of our conclusion that the taxpayers were employers of the captains and the crewmen they are not entitled to a refund of the taxes paid. The case is remanded to the district court with instructions to enter judgment for the government and to dismiss the complaint of the taxpayers.

REVERSED WITH DIRECTIONS.

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed Nov. 22, 1971]

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel

OF CONSIDERATION WHEREOF, It was now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed with directions in accordance with the opinion of this Court;

It is further ordered that plaintiffs-appellees pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

October 27, 1971

issued as Mandate: Nov. 19, 1971

APPENDIX C

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA–MARIANNA DIVISION

[Filed Sep. 30, 1970]

OPINION-ORDER

This is an action under the Internal Revenue Laws of the United States for the recovery of taxes paid pursuant to the Federal Insurance Contributions Act, 26 USCA, Sections 3101 et seq. and the Federal Unemployment Tax Act, 26 USCA, Sections 3301 et seq. for the period January 1, 1965, through June 30, 1968.

The issue to be decided is whether fishermen comprised of captains and crewmen who performed fishing services on plaintiffs' commercial fishing boats, were or were not employees of the plaintiffs under Sections 3121 (d) (2) and 3306 (i), Internal Revenue Code, Title 26, United States Code. The plaintiffs seek to have refunded that portion of Federal Insurance Contributions Act taxes and Federal Unemployment Tax Act taxes paid by plaintiffs.

Under Section 3121 (d) (2), Title 26, United States Code, "employee" means–

> "2. Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or . . ."

Section 3306, Title 26, United States Code, provides as follows:

> "(i) Employee.–For purposes of this chapter, the term 'employee' includes an officer of a corporation, but such term does not include–
>
> "(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or
>
> "(2) any individual (except an officer of a corporation) who is not an employee under such common law rules."

This Court has jurisdiction of this cause under Sections 1340 and 1346 (a), Title 28, United States Code.

The Court having considered the pleadings, stipulations and evidence and briefs of counsel, enters the following findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. The plaintiffs Charles F., Michael L., and L. M. Anderson are individuals, t/a Anderson Seafood Company. The plaintiffs Charles F. and Michael L. Anderson are individuals in a separate partnership. The plaintiff Lambert M. Anderson is an individual.

2. The plaintiffs were engaged in the business of commercially fishing for snapper, an edible fish. Their business activity embraced (a) the ownership of commercial fishing boats, (b) the gathering of snapper fish under oral arrangements with boat captains on the terms and conditions and pursuant to the customs, policies and usages discussed in these findings, and (c) the sale of the fish to others on the open market.

3. Each plaintiff owned one or more snapper fishing boats which operated in the Gulf of Mexico off the coast of Louisiana, Texas and Mexico. Each boat was purchased at a cost of from $34,000.00 to $45,000.00. The fish caught by the boats were returned and sold in markets throughout the United States.

4. The plaintiffs' boats were registered annually with the United States Customs Service in Panama City, Florida.

5. The plaintiffs' boats operated chiefly from docking facilities leased by the plaintiffs.

6. The plaintiffs' boats were intended to be operated solely for snapper fishing. All repairs were made by and paid for by the plaintiffs.

7. After the plaintiffs provided a boat for snapper fishing plaintiffs would select from the fishermen in the community making application therefor, a captain for the purpose of fishing for snapper in the Gulf of Mexico.

8. After an individual was selected as captain, the arrangements between the plaintiffs and captain were concluded and the boat was turned over to him by the plaintiffs. The captain would take the boat identification papers to the Bureau of Customs and would there register with the Bureau as captain of the boat as required by federal law.

9. Each captain selected and determined (a) the number of fishermen to comprise his crew (usually eight or nine members), (b) their qualifications, (c) their working conditions, and (d) agreed with them how much they would be paid.

10. Each captain had charge of his crew and determined (a) when to depart on a fishing trip, (b) when to return, (c) when to fish, (d) how to fish (i.e., the actual mechanical process of operating fishing gear) and (e) all other matters concerning the operation, maintenance and fishing of the boat from the time of departure from plaintiffs' docks until the return of the boat from a particular trip. The crewmen looked to the captains for their orders.

11. The captain agreed without a guarantee of any kind, to make fishing trips and return the catches to the home port for sale to the plaintiffs at a negotiated price per pound arrived at prior to the commencement of the trip.

12. The plaintiffs and the captains agreed and understood as part of their arrangement that the catches of fish were to be brought back to Panama City, Florida, for unloading and sale to the plaintiffs at an agreed price. Plaintiffs would terminate relations with a captain whose actions would endanger personnel, destroy property or dispose of the catch to others without plaintiffs' consent. Their relationship could be terminated by the plaintiffs if a captain failed to make profitable catches of fish. When terminations did occur it was at the conclusion of a trip or prior to commencing another one. It was never while a trip was in progress at sea. While either party could terminate the arrangement at the conclusion of any trip, custom and practice was for it to be continued over an extended period of time and for more than one trip. Some captains continued to make trips

over a period of several years. Others came and went elsewhere after making a few trips. The captains were free to perform similar services for other boat owners and did so without recrimination by the plaintiffs.

13. The fishing operations were conducted and treated by the parties as separate undertakings on a trip to trip basis. In the foregoing respect the plaintiff-owners did not direct or control the operations of the boats as to when they would leave port, where they would go to fish or when they would return. All the boats were operated in substantially the same manner and the arrangements and undertakings between the plaintiffs and all the captains were the same.

14. The plaintiffs did not undertake to instruct the captains concerning their methods of conducting fishing operations, nor did the plaintiffs have or reserve the right to control or direct their work or how to accomplish it. The plaintiffs' primary interest was to obtain and market the largest possible catches of snapper. There was no express agreement specifying the extent to which control may be exercised by the plaintiffs, but no actual control was exercised over the details and methods employed by the captains and crews.

15. The captain was responsible for unloading the fish after completion of a trip and for keeping the boat clean while in port after a trip. Neither the captain nor the crew was paid any additional amount for unloading or the cleaning work, except as such payment was part of the sale price of the fish to the plaintiffs. If a crewman failed to appear for unloading or cleaning and another individual was hired to perform this work, it was paid for by the absent fisherman or the captain. The plaintiffs had no responsibility for payment for such work.

16. Under the arrangement between the plaintiffs and the captains, consistent with the long-standing custom among snapper fishermen, the plaintiffs would purchase the collective catches of fish at a negotiated price per pound.

17. The plaintiffs had no direct relationship with the crewmen. The captain selected them and under their own sharing arrangement negotiated the amount the captain

and each fisherman would be paid out of the fisherman's separate catch of fish. Out of the unit price per pound paid by the plaintiffs to the captain for the fish, the captain retained a percentage of the sale price as compensation for leading the venture and the balance was paid to the individual crewman based upon the volume of his particular catch. The plaintiffs had no voice in these arrangements.

18. Each fisherman tallied his catch separately. His compensation was measured by the weight of his particular catch. No ther payments were made to him irrespective of the time or effort expended. A captain's earnings were based upon the success or failure of each individual fisherman's catch.

19. Three crew members were paid an extra amount for special services performed. The "icer" was paid one cent per pound based on the entire catch, over and above the proceeds from his own catch, for icing the fish in the hold. On the same basis the cook (also a fisherman in his own right) was paid one cent per pound, and the vessel's engineer was paid one-half cent per pound. These arrangements were solely between the captains and crewmen.

20. Various expenses were incurred by the captains and crewmen in connection with each fishing trip. The captain and crew paid for (a) all food, groceries and tobacco consumed, (b) all ice necessary for the trip, (c) all the diesel oil and fuel used in the operation, (d) furnished and paid for all fishing tackle necessary for making the catches, (e) all the bait carried by the boat, (f) all cooking bottled gas, as well as cooking utensils, bedding, laundry, knives, gloves, foul weather gear and the like and (g) chart paper used in depth recorders. They were also charged for the cost of a food freezer used to preserve their food during the trip as well as rental payments for use of the radar equipment. All of the foregoing were charged against the proceeds from the sale of their catches to the plaintiffs. Boat repairs and maintenance costs, which were substantial, were the expense of plaintiffs.

21. The owner of the vessel was responsible to crewmen for defects in the vessel and was responsible for property damage to the vessel. In addition, insurance, if any, was paid for by the plaintiffs.

22. After completion of a fishing trip the plaintiffs purchased the fish the same day they were unloaded. Following the sale a complete statement of settlement in writing was made between plaintiffs and the captain and crew. Checks were drawn by plaintiffs and the captain and crew members were paid by plaintiffs. The settlement statement indicated the gross amount of the proceeds from the sale of the fish. The amount due each fisherman and the captain was shown. The cost of the aforementioned items purchased by the fishermen and paid for by the plaintiffs was reimbursed to the plaintiffs.

23. The captain decided how much fuel and ice to take aboard. These items could be purchased anywhere but were usually purchased where plaintiffs had credit. These expenses were the obligation of the captain for each trip.

24. Each time a boat returned to port, the trip was considered completed and the work of fishing on that trip concluded. A complete settlement of all monies involved in the purchase and sale of the fish together with amounts to be deducted as charges against the fishermen for trip expenses was considered a separate transaction. The amount paid to each crewman differed depending upon the volume of his particular catch. The earnings of the captain depended solely upon the collective volume of the crewmen's catches. During the course of the trip each fisherman would segregate his own catch, weigh it and report his volume to the captain. The "icer" would place the crewmen's tallied fish catch in the refrigerated hold with the other catches. The captain kept his own tally-sheet disclosing the weight of each catch reported by the crewmen and recorded the total volume in weight caught by each man each day. At the conclusion of the trip, the captain's tally-sheet was turned in to plaintiffs' office for a computation of the total volume of each crew-

man's catch and a determination of the gross sale price for the collective catch for the particular trip.

25. Normally a trip would last from one to two weeks. However, it was within the captain's discretion to fish a shorter time if he so desired. If the captain decided to remain near the fishing grounds and not return to Panama City, he would arrange to come into a nearby port and unload the catch on trucks for delivery to the plaintiffs.

26. The length of a captain's trip from the home port depended upon many factors such as the capacity of the boat, the fuel and ice supply, the weather, the presence of the fish, and failure of the vessel's machinery and equipment. Whether the trip could continue or terminate in the light of these factors was left to the captain's discretion. While it was to the interest of all parties to fish the boats as often as possible, the captain decided how long he would remain ashore between trips.

27. There was no guaranteed compensation of any kind to the captain and crewmen regardless of the time and effort expended in attempting to catch fish. Plaintiffs paid no bonuses to the captains. In some instances, depending upon market conditions, plaintiffs limited the amount of croaker fish and baby snapper they would purchase at the agreed price. However, plaintiffs accepted the excess croaker and baby snapper with the understanding that the fish would be sold on consignment and whatever price was obtained would be divided between the plaintiffs and fishermen on a negotiated basis.

28. If a trip was unsuccessful (known as a "broker") and the value of the catch was insufficient to pay for the trip expenses incurred, such expenses were carried over to a succeeding trip and deducted from the proceeds of a subsequent catch. The unpaid expenses became the personal obligation of the captain.

29. The plaintiffs' boats were not equipped with ship-to-shore telephones. They were equipped with radios which permitted contact with the boats only through the marine operator. The communications between the plaintiffs and the boats during fishing were infrequent, usu-

ally only in cases of emergency. The captain would call the plaintiffs in the event of a breakdown requiring repairs. It was the custom for a captain to call the plaintiffs about twenty-four hours before returning to port to unload. The purpose of the call was to have the unloading facilities ready when the boat arrived.

30. It was agreed that the captains would bring their catches to Panama City, Florida, if possible, and sell them to the plaintiffs at an agreed price per pound. While the plaintiffs did not guarantee any captain a profit from his fishing, plaintiffs did guarantee each captain a market for his catch at the agreed price.

31. A captain could and did often obtain advances of money from the plaintiffs against anticipated earnings. Advances to crewmen were made only at the direction of the captain who assumed personal liability for their repayment if not paid by the crewmen. All advances were considered debts owing from the captains to the plaintiffs.

32. The arrangements between the plaintiffs and the captains contemplated a right reserved by the plaintiffs to control the results of the fishing venture and they interfered in the process to some degree to assume a proper result. The plaintiffs' primary interest was to obtain the largest catches of marketable fish possible. The manner, methods and details of conducting the fishing operations being the sole prerogatives of the captains, were conducted without interference by the plaintiffs.

33. The plaintiffs had no control over the crewmen, nor did they attempt to exercise any control over their activities through the captains, nor did plaintiffs intend to reserve such exercise of control over them.

34. Plaintiffs filed a claim for refund of their portion of the Federal Insurance Contributions taxes and the Federal Unemployment taxes paid on the earnings of the captains and crewmen. The claim was disallowed by the Commissioner of Internal Revenue and this action, which followed, was timely filed.

CONCLUSIONS OF LAW

1. The provisions of Sections 3121 (d) and 3306 (i), Title 26, United States Code, provide that the common law rules are applicable in determining who are employees under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

2. In determining whether the fishermen who worked on the vessels of the plaintiffs were employees it is necessary to apply the standards of maritime law. The standards of the common law applicable to land-based activities cannot be applied in determining whether the fishermen are employees within the meaning of the Acts. *United States v. Webb, Inc.*, 397 U.S. 179 (1969).

3. As was stated by the Supreme Court in Webb, *supra*, at page 192:

> "Control is probably the most important factor under maritime law, just as it is under the test of land-based employment. It may be true that, in most maritime relationships, the workers enjoy discretion that is unusually broad if measured by land-based standards—a discretion dictated by the seafaring nature of the activity. However, except *where there is nearly total relinquishment of control* through a bare-boat, or demise, charter, the owner *may* nevertheless be considered, under maritime law, to have sufficient control to be charged with the duties of an employer . . ."
>
> (Emphasis added)

It is argued by the United States that in the absence of a demise charter it is clear that the seamen are employees under the rules set forth in *Webb v. United States*, 402 F. 2d 956 (5th Cir. 1968) and by the decision of the Fifth Circuit Court of Appeals on remand in *United States v. Webb*, ___ F.2d ___ (1970). In this connection it should be pointed out that the Court in *United States v. Webb*, 402 F.2d 956, 959, states:

> "This is so because it is clear that under maritime law the captain is the agent of the owner (*on the facts here*) and the crew hands are employees."
>
> (Emphasis added)

This Court cannot conclude that the Fifth Circuit Court of Appeals intended to hold that in all cases of this nature the captain and crewmen are employees absent a demise charter.

4. The Court concludes that there is less control in the case at bar than existed in Webb, *supra*, and *Cape Shore Fish Co. v. United States*, 330 F.2d 961 (Ct. Cl. 1964). In Webb, the boat owners designated the general area for conducting fishing operations, determined the number of crewmen to be hired, furnished captains with a fixed pay scale for crew members, determined whether to pay bonuses at the end of the season and equipped the boats with the necessary fishing gear. In the case at bar the captain determined in what area he would fish, determined the number of crewmen and hired and fired the crewmen, compensation was decided by the captains and the crew and the captains and the crew furnished all fishing gear for the venture. In addition, the captain and the crew members paid for all chart paper used in the depth finder and paid rental for radar equipment on the boat. In Cape Shore Fish Co., *supra*, the owner exercised some control over hiring, determined how much time would elapse between trips and the maximum number of hours a captain and crew could work and was governed by a union contract to which the owner was a party and the captain and crew were beneficiaries. Further, the owner instructed the captains in what areas to fish, the duration of the fishing voyage and agreed to pay certain specified per diem compensation in the event a trip was a "broker". In the instant case none of these elements of control was present

In Cape Shore Fish Co., *supra*, the Court of Claims discussed *Maniscalco v. Director of Division of Employment Security*, 97 N.E.2d 639 (Mass. 1951), in which the Court held that there was no evidence to support a finding of employee status in a case involving the interpretation of a Massachusetts Unemployment Compensation statute. This case is discussed in length in Cape Shore Fish Co., *supra*, and apparently not with disapproval.

5. The pertinent regulations, 26 CFR, Sections 3121(d)-1(c)(2), are helpful in determining whether the crewmen are employees under the existing statutory provisions. In Section 3121(d)-1(c)(2) it is stated:

> "Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules..."

In the instant case the owner of the vessel had the right to control the result to be accomplished by the services performed by the captain or crewmen but did not have the right to control the details and means by which the result is accomplished. The only substantial element of control retained by the owner consisted of the right to take the vessel from the captain if the venture proved unprofitable, or the captain was guilty of misconduct.

6. The Court has considered the cases involving the Jones Act and cases in which maintenance and cure are

sought by seamen and holds that the results in these cases are not controlling as to the issue of whether the fishermen are employees of the owner.

7. This Court has intentionally not cited various authorities referred to in the exhaustive and helpful briefs submitted by the parties as the cases cited were decided prior to the decision in *United States v. Webb, Inc.*, 397 U.S. 179 and since in these cases and treatises it is not clear that the courts applied the general maritime law in arriving at a decision. Some courts have held that the crewmen were employees under the Acts and some have held that the crewmen were not employees.

8. The captains and crew members were not employees of the plaintiffs within the meaning of Sections 3121(d) and 3306(i) of the Internal Revenue Code and pertinent regulations.

9. The plaintiffs are entitled to a refund as claimed in the complaint by reason of the erroneous payment and collection in an amount to be agreed upon together with interest as may be allowed by law. Each party shall bear his own costs. If the amount of the judgment is not agreed upon this question shall be settled upon five (5) days notice.

Judgment shall be entered in favor of the plaintiffs.

This order entered this 30th day of September, 1970, at Tallahassee, Florida.

DAVID L. MIDDLEBROOKS
United States District Judge

APPENDIX D

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 3121. DEFINITIONS.

(a) • • •

• • • •

(d) *Employee.*—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

• • • •

[26 U.S.C. (1952 ed., Supp. II) 3121.]

SEC. 3306 [as amended by Sec. 1, Act of September 1, 1954, c. 1212, 68 Stat. 1130]. DEFINITIONS.

(a) • • •

(i) *Employee.*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

• • • •

(26 U.S.C. 1964 ed., Sec. 3306.)

Treasury Regulations on Employment Tax (1954 Code):

§ 31.3121(a)-1

• • • •

§ 31.3121(d)-1 WHO ARE EMPLOYEES.

• • • •

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom services are performed the legal relationship of employer and employee.

(2) Generally such relationship exists when the persons for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the

pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

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(26 C.F.R. 31.3121(d)-1.)

§ 31.3306(i)-1 WHO ARE EMPLOYEES.

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31-.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors charactristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods

for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

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[26 C.F.R. 31.3306(i)-1.]

[46 U.S.C.A. § 688 (Jones Act)]:

"§ 688. RECOVERY FOR INJURY TO OR DEATH OF SEAMAN.

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees, shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Merchant Marine Act of 1920, ch. 250, 41 Stat. 988, Sec. 33)